United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,[illegible]66

489A

WALLACE RICE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL IN FORMA PAUPERIS FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Paul Daniel
Frederick S. Hird, Jr.

Klagsbrunn & Hanes
710 Ring Building
Washington, D. C. 20036

Attorneys for Appellant
(Both appointed by this Court)

STATEMENT OF QUESTIONS PRESENTED

1. Whether the requirement of proof of corporate identity, existence and ownership of goods allegedly stolen from a corporation is satisfied by the inconsistent testimony of two store detectives and a saleslady who were admittedly unfamiliar with the affairs and structure of the supposed corporation.

2. Whether, on a prosecution for grand larceny, proof of value in excess of $100.00 may be made by price tags and testimony as to customary mark-up practices alone, with no evidence of actual cost or of sales at the quoted prices.

3. Whether hearsay evidence of a three-word oral statement of the Appellant was properly received as an admission against him when the statement was in fact highly ambiguous and not at all clearly an admission against interest, and where the statement was made as the result of interrogation of the Appellant while in the custody of store detectives, without prior advice as to his rights.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,186

WALLACE RICE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal in Forma Pauperis from a Judgment of Conviction of the United States District Court for the District of Columbia for Violation of Section 2201, Title 22, District of Columbia Code.

BRIEF FOR APPELLANT

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*Cases or authorities chiefly relied upon are marked by asterisks.

JURISDICTIONAL STATEMENT

Appellant, Wallace Rice, was indicted on a charge of a violation of D. C. Code § 22-2201 (1961), Act of March 3, 1901, ch. 854, § 826, 31 Stat. 1324; as amended by the Act of August 12, 1937, ch. 599, 50 Stat. 628, and the Act of June 29, 1953, ch. 159, § 215(a), 67 Stat. 99. (Indictment). Rice pleaded not guilty and was tried in the United States District Court for the District of Columbia. He was convicted and sentenced to imprisonment for a term of 40 months to 10 years. (Judgment and Commitment). The District Court had jurisdiction pursuant to the Act of December 23, 1963, § 1, 77 Stat. 482, D. C. Code § 11-521 (Supp. V, 1966). This Court has jurisdiction of the appeal pursuant to the Act of June 25, 1948, ch. 646, 62 Stat. 929, 930, as amended, 28 U.S.C. §§ 1291, 1294 (1964).

STATEMENT OF THE CASE

Appellant, Wallace Rice, was indicted on January 10, 1966 on a charge of Grand Larceny. The indictment charged that on or about October 9, 1965 Rice "stole the property of The May Department Stores Company, a body corporate, of the value of about $348.00, consisting of five coats." See D. C. Code § 22-2201, supra.

At the trial, three witnesses testified for the prosecution, two store detectives and a saleslady in the coat department of the store. All three gave oral testimony as to the identity of their employer. One identified her employer as "The May Department Stores Company, trading as The Hecht Company," and stated that The May Department Stores Company was a corporation (Tr. 9-10). The second said she was employed by "The May Company, trading as The Hecht Company" (Tr. 54). The third answered only that she worked for "the Hecht Company" (Tr. 66). No other evidence pertaining to the corporate existence, identity or relationship of The May Department Stores Company, The May Company, or the Hecht Company, or their ownership of the property in question was offered.

The two store detectives testified to the events occurring and the actions of the Appellant at the Hecht Company store on the day in question as follows:

> Appellant was first observed walking about on the third floor of the store, dressed in ordinary work clothes somewhat resembling the clothes worn by store porters but without the distinctive markings of the porters' outfits. (Tr. 11-14, 35-38, 55). He was pushing a canvas "Hecht Company" hamper loaded with cartons, the contents of which, if any, were not identified (Tr. 11, 13, 38, 55-58).
>
> Appellant was first seen emerging from the bridal shop and entering the coat department (Tr. 55). He walked back

into the stockroom and out again (Tr. 55), tampered briefly with a cloth coat on a rack but left that place when a customer approached (Tr. 13), and then went to another part of the department where suede coats hung on a rack (Tr. 14, 57). Having left the hamper behind, he placed five suede coats from the rack into a carton and walked away with the carton across the third floor (Tr. 14, 58). He was followed by the two store detectives who were then joined by a third, a Mr. Sandberg (Tr. 17, 59). Appellant was walking "at a good rate of speed," (Tr. 17) but not running or "almost running." (Tr. 50). He passed through or by one or two dress departments and was arrested by Mr. Sandberg in front of another department, called the Embassy Room, where he put up what one witness described, without details, as "a little struggle" (Tr. 59).

At this point, Appellant had travelled a considerable distance from the suede coat rack -- up to 500 feet, according to one witness (Tr. 50) -- but was still a distance of 50 to 100 feet away from the elevators (Tr. 51). There was no testimony as to stairways, or their location.

Appellant was taken by the three detectives to the store security office on another floor where routine information -- name, address, etc. -- was obtained from him for the "police

papers" (Tr. 22, 30-31). He was detained in the security office until the police arrived, a period of at least some 30 to 45 minutes (Tr. 24, 34), during which time the "second in charge of all security for all Hecht Company stores" (Tr. 26), a Mr. Cooper, questioned and talked to him. Both store detectives who testified said that at some point during the 30-to-45 minute period of detention, questioning and conversation, Appellant was asked, in substance, why he took the coats and answered, "You've got me" (Tr. 30, 34, 60). Both store detectives testified that they did not hear or could not recall the other parts of the conversation during this period (Tr. 25-26, 60). One store detective testified that at some point Mr. Cooper "did inform him [Appellant] of his rights" (Tr. 25), but when and how was not stated.

This hearsay testimony as to Appellant's statement was permitted by the trial judge over the Appellant's objection (Tr. 7, 21, 31, 33); and was characterized, by clear implication in the prosecutor's opening and closing statements (Tr. 6-7, 98), and directly in the judge's charge to the jury (Tr. 117) as an admission or incriminatory statement.

The saleslady who testified identified the retail price tags on four of the coats and testified as to the retail price of the fifth (Tr. 67-76). She also testified as to her understanding that

a 40 percent mark-up from wholesale to retail price was the usual or customary practice at The Hecht Company (Tr. 69-71), although she did not have specific knowledge of the wholesale price paid or the actual mark-up applied in this instance (Tr. 72, 77-78, 85-86). No other evidence of cost, value or actual sales price of these or similar coats was offered.

The five suede coats alleged to have been stolen by Appellant, with their price tags, were offered into evidence but only four were admitted since the fifth was not properly identified (Tr. 87). The retail asking price shown on the tags of the four coats placed in evidence ranged from $80.00 to $130.00 (Tr. 69-75). The receipt of the coats into evidence concluded the Government's case (Tr. 87).

At this point the Appellant moved for a directed verdict of acquittal for failure of the Government to prove a larceny because the identity of the owner of the goods was not shown, and for failure of the Government to prove that the value of the goods in question exceeded $100.00 (Tr. 87-89, 92-95). These motions were denied (Tr. 89, 92, 93, 95).

The Appellant did not testify and presented no witnesses. After argument and instructions to the jury, it retired, and returned with a verdict of guilty (Tr. 127).

STATUTE INVOLVED

D. C. Code § 22-2201. Grand larceny.

Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years. (Mar. 3, 1901, 31 Stat 1324, ch. 854, § 826; Aug. 12, 1937, 50 Stat. 628, ch. 599; June 29, 1953, 67 Stat. 99, ch. 159, § 215(a)).

STATEMENT OF POINTS

1. The indictment charged Appellant with having stolen property of The May Department Stores Company, but the evidence offered at the trial by the prosecution to establish the corporate existence and identity of that company, and its ownership of the property in question, was not probative of these questions. The trial court erred in not directing acquittal.

2. The prosecution's evidence of the value of the property in question was not sufficient to establish a value of more than $100.00 so as to sustain the verdict of guilty of grand larceny.

3. The trial court erred in admitting testimony regarding an allegedly self-incriminatory statement made by Appellant, because the statement was ambiguous and because it was made as a result of interrogation of Appellant while he was in the custody of store detectives, without prior advice as to his rights.

SUMMARY OF ARGUMENT

I.

A necessary element in the proof of larceny is identification of the owner of the allegedly stolen goods and, where the owner is said to be a corporation, of its identity and existence. In the trial below, the only evidence that the alleged owner had corporate status was the testimony of one admittedly unqualified witness. Furthermore, it was not made clear which of several possible corporate affiliates was the owner. This proof does not meet the standards of the prior decisions of this Court.

II.

A necessary element in the proof of grand larceny in the District of Columbia is a showing that the value of the goods in question exceeded $100.00. The only evidence of value here was retail price tags attached to the goods and testimony of customary "mark-up" practices. There was no evidence of actual sales of the goods at the marked price, no evidence of actual cost, and no opinion evidence of value. Thus actual value was unproved.

III.

Over the objection of Appellant, the trial court admitted testimony of a statement allegedly made by Appellant while in the custody of store detectives after they arrested him. This

was error because:

(A) The statement, "You've got me," was inherently ambiguous and therefore not admissible as inconsistent with Appellant's profession of innocence. The statement, furthermore, was prejudicially characterized as incriminatory by the prosecutor before its admission and by the judge afterwards. Its improper receipt therefore injured Appellant.

(B) On the other hand, if the statement was self-incriminatory, and therefore theoretically admissible, its receipt was improper because it was the product of interrogation of Appellant while he was in custody after apprehension. There is no showing in this record that Appellant was properly advised of his right to remain silent, or to have counsel, or that he was advised that such statements could be used against him. The use of such a statement against Appellant when produced by interrogation under these circumstances violated his rights of counsel and against self-incrimination.

ARGUMENT

I. The Government Failed To Prove the Corporate Existence and Identity of the Purported Owner of the Stolen Goods, and Its Ownership of the Goods.

> With respect to Point I the appellant desires the Court to read the following pages of the reporter's transcript: Tr. 9-10, 34-35, 54, 66-68.

In a larceny prosecution, it is necessary to prove the identity of the owner of allegedly stolen goods, and, where the owner is alleged to be a corporation, that it has a corporate existence and identity. Bord v. United States, 76 U.S.App.D.C. 205, 133 F.2d 313, cert. denied, 317 U.S. 671 (1942); Bimbo v. United States, 65 App. D.C. 246, 82 F.2d 852, cert. denied, 297 U.S. 721 (1936). In this case, this was not done. A directed verdict of acquittal was sought on this ground, and was improperly denied (Tr. 92-95).

The goods which were the subject of this larceny prosecution were said by the indictment to have been stolen from "The May Department Stores Company, a body corporate." The only testimony in this record that The May Department Stores Company is a corporation is that of one store detective. She was asked a leading question as to whether the Company was a corporation and said that it was (Tr. 9). No effort was made to explain her source for this information or her qualifications with respect to it.

This Court has never held that such unqualified testimony was sufficient to prove the corporate existence and identity of the purported owner of the stolen goods, much less the ownership itself. The three decisions of this Court on the subject have all involved much more substantial proof. Bord v. United States, supra, was an appeal from a conviction of larceny from a theater. The proof of the corporate existence and identity of the owner of the theater included testimony of an assistant manager of the theater and the testimony of an independent witness that the theater was owned and occupied by the corporation, identification of the seal of the corporation by the independent witness, and a showing that the alleged owner paid the taxes on the theater. Even with this quantity of evidence, Associate Justice Stephens dissented on the ground that the proof was insufficient, but the Court held that this proof would suffice.

In Bimbo v. United States, supra, a case of larceny from a bank, the proof of the bank's corporate identity consisted of testimony by the conservator of the by-then defunct bank that it had been in existence as a corporation on the date of the theft, and the production of a facsimile of the corporate seal. The Court said, "[T]he corporate character of the bank may be proved by parol evidence of an officer or other person acquainted with the fact." (65 App.D.C. at 249, 82 F.2d at 855). Given the testimony of a person well-acquainted with the affairs of the corporation,

the court, therefore, affirmed.

Fields v. United States, 27 App.D.C. 433 (1906), cert. denied and writ of error dismissed, 205 U.S. 292 (1907), is an embezzlement case raising the corporate identity question. The charge was that the receiver of the corporation had embezzled funds from it. An effort was made to identify the corporation by proving the actual Articles of Incorporation from the records of the Register of Deeds, but this failed, and the court had to consider the adequacy of the other testimony. This included the testimony of several persons who had participated in the organization of the corporation, or who held stock, as to its corporate status. There was additional testimony that the corporation was in business until the time of its insolvency. Even more significantly, the court found that the defendant, as receiver of the corporation, was in no position to deny the de facto existence of the corporation. In this set of circumstances, the court held that the corporate existence was adequately proved.

All these cases involved testimony by persons shown to have been well acquainted with the corporate affairs of the company. Some of them involved proof of the corporate seal. They involve ownership of land, payment of taxes, and other factors of existence which strongly imply the de facto existence of the corporation. In this case, the single statement of an admittedly uninformed

store detective totally lacks probative value. It comes nowhere near the standard of the prior decisions of this Court.

The question of corporate identity is made particularly important here by what appears to be an involved corporate structure. The testimony shows that "The May Department Stores Company," whatever it may be, trades as "The Hecht Company." The three witnesses for the prosecution spoke variously of "The Hecht Company," "The May Department Stores Company," and "The May Company." ("Yes, this is the property of The May Company or the Hecht Company." Tr. 67.) The three witnesses gave these three different organizations as their employers. (Tr. 9-10, 54, 66). It is unclear which of these are claimed to be corporations, or whether they all are, whether one of these companies owns the others, and so on. It is most emphatically unclear which company owned the store, or the coats which were the subject of the prosecution. No proof at all touched this point. It is not permissible to allow the court and jury to guess at the corporate structure and identity, and to guess who owns the coats.

The problems that arise if there are subsidiaries involved are not just academic. In Cartwright v. United States, 146 F.2d 133 (5th Cir. 1944), the defendant had been convicted of stealing property of the United States. The testimony showed that the property belonged to the Defense Plant Corporation, the shares of which

were owned by the United States. The court reversed, pointing out that the law recognizes a distinction between a corporation and the owner of its stock, and the property of one is not the property of the other. Unless The May Department Stores Company, The May Company and The Hecht Company are one and the same thing, an indictment for stealing the coats of The May Department Stores Company cannot be sustained by proof of the theft of coats from something described as the Hecht Company. (Compare Tr. 4 with Tr. 10, 16.) It has not here been proved that they are the same.

The requirement of proof of corporate status and identity is regularly upheld in other local courts. For example, in Nelson v. United States, 142 A.2d 604 (D.C.Mun.App. 1958), the court reversed because an allegation that the owner of a stolen radio was a corporation was not proved. In that case a card showing an alleged facsimile of the corporate seal was admitted into evidence but the court found that the card was not sufficiently identified to suffice as proof, and that the other testimony was inadequate. Similarly, in 1962, the Court of Appeals of Maryland reversed a conviction for a larceny from a delivery truck on the ground that "There was no testimony that the firm was a corporation, no reference to its organization or activities, [and] no detail of the relationship between the firm and the driver . . . ." Sippio v. State, 227 Md. 449; 177 A.2d 261, 262 (1962). See also Richardson

v. State, 221 Md. 85, 156 A.2d 436 (1959).

It would have been easy in this case to prove that The May Department Stores Company is a corporation, if it is, and that it is the owner of the coats, if it is. Official documents showing corporate status of a firm owning property and doing business in the District of Columbia are easily available to the prosecution in the offices of the District Government. Copies of any corporate documents would help serve as proof. Copies of invoices showing payments for the coats might serve as proof.[1/] Consistent testimony of the witnesses when asked by whom they were employed would have helped. So would documentary proof of employment. Obviously, it should not be necessary to bring in a corporate officer for every such prosecution of proof of corporate status. But it is necessary, to prove the terms of the indictment, to show some proof of who the owner of stolen property actually was and, if the real owner is a corporation, that it is in fact a corporation, capable of ownership. The prosecutor here failed completely to make any real effort to do this, and left an essential element of the indictment unproved. The motion for a directed verdict of acquittal for this failure of proof should have been granted.

1/ These would further have served to prove the value of the goods, which the Government also failed to do. See Part II, infra.

II. The Government Failed To Prove That the Value of the Stolen Goods Exceeded $100.00.

With respect to Point II the appellant desires the Court to read the following pages of the reporter's transcript: Tr. 66-79, 85-86.

The evidence of the value of the four coats in question was not sufficient to sustain the jury verdict. The coats came from the stock of merchandise of The Hecht Company department store. A sales clerk from the store testified as to the retail prices affixed to the coats when these were removed from stock and placed on sale, but could not recall whether or not the price tags had been affixed by her (Tr. 72). She had no knowledge of the wholesale cost of the coats and had not seen the invoices, but she testified as to her understanding of the customary or usual mark-up practices of The Hecht Company (Tr. 69-72, 85).

Although this evidence showed the original retail asking price, it did not establish that the stock of coats from which the four in question came were seasonably sold at that price rather than at a reduced price.

The sales clerk testified that she had long experience in department store sales work but no experience as a buyer (Tr. 76). She gave no testimony as to her qualifications to judge the quality or value of leather goods and gave no personal judgment or opinion as to the value of the coats.

As to her testimony concerning customary mark-up practices, the trial judge observed "that she is guessing," and that the testimony, while not objectionable, "is just not very probative" (Tr. 70). The guesses of an unqualified witness do not measure up to the standard of proof required to support a conviction of grand larceny. "It is . . . well settled that where the grade of larceny, and consequently the punishment, depend on the value of the property, it is essential that the value of the property defendant is charged with having taken be alleged and proved." Cartwright v. United States, 146 F.2d 133, 135 (5th Cir. 1944). Where evidence of value is inadequate to sustain a finding of a value of $100.00 or more, conviction of grand larceny is impossible. Ransom v. United States, 119 U.S.App.D.C. 154, 337 F.2d 550 (1964); United States v. Wilson, 284 F.2d 407 (4th Cir. 1960).

Mrs. Smith's testimony as to her understanding of customary mark-up practices was not sufficient. Compare Yonan Rug Service, Inc. v. United Services Automobile Ass'n, 69 A.2d 62 (D.C.Mun.App. 1949), where the owner of rugs testified as to their value based on advice received from a rug dealer. This evidence was held insufficient to establish value because the owner "did not testify as to her estimate of the value of the rugs." (69 A.2d at 64; emphasis added.)

The common-sense judgment of a jury of laymen cannot be

relied upon to satisfy the requirement of proof beyond a reasonable doubt of the value of leather goods, taken from the rack in brand-new condition. Many imported goods are very cheap, and many cheap items glitter when they are brand new. Moreover, the testimony established that these were private-label goods ("made especially for The Hecht Company," Tr. 77), a circumstance commonly indicative of a special buy and low cost rather than high cost, as in the case of a prestige, brand-name label.

In United States v. Wilson, supra, the defendant was convicted of stealing 72 rifles belonging to the United States. He challenged the legality of his 7-1/2 year sentence on the ground that the Government failed to prove the value of the rifles was more than $100.00 so as to warrant a sentence of more than one year. The court refused to take judicial notice that the 72 rifles were worth more than $100.00. It said:

> "[B]ut we cannot on the basis of anything in the testimony form a judgment as to value for the purpose of supporting the greater penalty. Nor, in the absence of any proof of value, could the jury be permitted to speculate on this point merely from the appearance of the articles. A fact which distinguishes a violation punishable by imprisonment for not more than one year from a violation punishable by imprisonment for ten years cannot be permitted to rest upon conjecture or surmise." (284 F.2d at 408).

It is apparent in this case that the jury's verdict as to value rested too heavily upon speculation or surmise rather than competent evidence, requiring reversal.

III. The Trial Court Erred in Permitting Testimony of a Statement Made By Appellant While He Was in Custody and Under Questioning By Department-Store Detectives Before Being Informed of His Rights.

With respect to Point III the appellant desires the Court to read the following pages of the reporter's transcript: Tr. 6-7, 21-34, 98, 117.

A. Appellant's statement was not admissible into evidence because it was not an admission or incriminatory statement.

The trial judge committed error in admitting hearsay testimony of Appellant's ambiguous, casual and slang answer, "You've got me," to a highly loaded question from a store detective; in permitting the prosecuting attorney to misquote and mischaracterize this statement in his opening remarks (Tr. 6) and represent in his closing argument, with no supporting evidence, that Appellant gave no other explanation of what he was doing with the coats (Tr. 98); and in stating in his charge to the jury that Appellant's statement was an admission or incriminatory statement (Tr. 117).

Some little time after his arrest and removal to the store's security office on another floor, the Appellant was asked about why he took the coats and replied, "You've got me." Both store detectives who testified stated his answer in identical words (Tr. 34, 60), so there is no doubt as to exactly what Appellant said. Neither stated the exact wording of the question which had been put to Appellant.

This testimony was hearsay and normally inadmissible. It was permitted by the trial judge as evidence of an admission or incriminatory statement by Appellant but it was not an admission since it had no reasonably inferable meaning inconsistent with Appellant's profession of innocence of intent to steal.

"You've got me" is a highly informal or slang expression used to connote no more meaning than "I don't know," a mere verbal shrug of the shoulders, as it were. It is not truly responsive to a question and, in the context of interrogation of an accused by a detective it clearly connotes indifference, uncooperativeness or even hostility.

It must be kept in mind that the question asked was a loaded question -- why did you take the coats, or words to similar effect -- which requires some care and thought in answering to avoid entrapment by misinterpretation. Appellant is not an educated man and it cannot be supposed that clarity or precision of expression is one of his strong points. His circumstance of detention in an unfriendly environment, awaiting the arrival of the police, was not conducive to calm thinking and considered responses. On the other hand, the statement was not a spontaneous or excited utterance made at the time of arrest.

The witness who testified did not give the exact phrasing of the question asked of Appellant, which could seriously affect

the interpretation of the answer, and the jury did not hear the inflection or manner of speech in which the words were uttered. The testimony was given by two ladies of undoubtedly more delicate habits of speech than Appellant, who probably never used such a phrase themselves, and whose testimony conveyed none of the flavor of the original statement.

Moreover, the isolated three-word utterance was lifted out of its context somewhere in the course of some thirty or more minutes of questioning and conversation. The witnesses called by the prosecution did not hear or could not recall any other parts of the long conversation between Appellant and Mr. Cooper, and Cooper was not called to testify.

In these circumstances, any assumption that Appellant's curt and informal response had a meaning implying admission of purpose to steal the coats was totally unjustified speculation.

The prejudice to Appellant from admission of the statement was compounded by the comments of prosecutor and judge which had the effect of implanting in the minds of the members of the jury an authoritative interpretation of Appellant's words as an admission or incriminatory statement. In his opening statement (Tr. 6), the prosecutor misquoted and mischaracterized Appellant's statement as, "'Well, I guess you caught me' -- words to that effect," with the clear implication that the statement was made at the time

of Appellant's arrest. As thus described by the prosecutor to the jury at the outset of the trial, the statement would have amounted to an admission. The action of the trial judge in admitting the testimony lent added weight and dignity to the prosecution's strained interpretation of the statement. In other words, the jury first heard the testimony about Appellant's statement after being conditioned to receive it as an admission.

In his closing argument (Tr. 98), the prosecutor again referred to the statement and elaborated by asserting there was "no explanation as to what he was doing carrying the coats, no indication of a mistake or anything of that kind." There was, in fact, no testimony as to lack of explanation, since the witnesses testified that they did not hear or could not recall other parts of Appellant's half-hour conversation. It was, therefore, unfair and prejudicial for the prosecutor to try to parlay the deficiencies of his own witnesses into affirmative evidence of no explanation in support of his strained interpretation of Appellant's statement.

In his charge to the jury (Tr. 117), the trial judge also characterized Appellant's statement as an oral admission or incriminatory statement, lending authoritative endorsement, in the eyes of the jury, to the prosecution's characterization of Appellant's statement as an admission.

In view of these facts, it was clearly prejudicial error to permit the testimony of Appellant's statement to be given,

compounded by the error in allowing the above-discussed comments thereon. In ruling on admissibility, the trial judge did not consider the lack of incriminatory meaning in the statement but focussed exclusively on the matter of voluntariness: "All we are trying to determine now, as I understand it, is whether or not this is a voluntary statement." (Tr. 29). However, voluntariness should not come into play until it is first established that the accused's statement was, in fact, an admission. Since this was not established here, permitting the testimony was plain error.

B. Appellant's statement was not admissible because it was made in response to questioning by detectives before Appellant was informed of his rights.

Alternatively, even were it assumed that Appellant's statement was incriminatory, its admission into evidence was erroneous under the principle of Escobedo v. Illinois, 378 U.S. 478 (1964).[2/] Appellant was taken into custody by store detectives who "arrested" him themselves. He was then held for the police, and while he was held, he was interrogated. Clearly, so far as Appellant was concerned, the criminal process had focussed upon him and become accusatory while he was being interrogated by the store detectives. Appellant had not been informed of his rights at this point, and there is no more justification for the use of a self-incriminatory statement made under these circumstances against him in his trial

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2/ While this case was tried before the decision in Miranda v. Arizona, 34 U.S.L.Week 4521, June 13, 1966, so that holding is not binding here, Johnson v. New Jersey, 34 U.S.L.Week 4592, June 20, 1966, the elucidation of the Escobedo rationale in Miranda is applicable and important.

when it was made under interrogation by the store detectives than if it had been made under interrogation by the police.

Before testimony as to the allegedly incriminatory statement was allowed, on the request of the defense counsel, the witness, Miss Emory, was examined on voir dire (Tr. 21-31), following which her testimony regarding the so-called "admission" was given to the jury (Tr. 32-34).[3/] Miss Emory testified that when Appellant was taken to the security office she first questioned him to obtain the routine information -- name, address, etc. -- for the police papers (Tr. 22). This took 10, 15 or 20 minutes (Tr. 22, 28), and "during that period of time" (Tr. 22) "we" or "I" (Tr. 22, 30) asked Appellant why he took the coats, to which he replied "You've got me." (Tr. 23, 30). From this testimony, it would appear that this question and answer were made before Appellant was advised of his rights. However, on cross-examination, Miss Emory made several confusing statements, concerning the nature and timing of the advice to Appellant of his right to counsel and

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3/ Mrs. Kling, the other store detective, testified very briefly on the subject, as follows (Tr. 60):

> "Q. Did you hear any conversation between the defendant and anyone else about the coats?
>
> "A. No. He just said, 'You've got me.' That is all I can recall him saying."

his right to be silent. There was no testimony regarding advice to him of the use that might be made against him of any statements.

Miss Emory testified that Mr. Cooper, second in charge of security for all Hecht stores, was also in the security office (Tr. 24, 26); that someone informed Appellant of his rights (Tr. 25); that she did not remember who did (id.); that she thought Cooper did (id.); that she knew Cooper did (id.); that Cooper was talking to Appellant at the time but she could not remember what else he said (id.); that such advice of a suspect's rights "is a normal thing that he [Cooper] does with everybody that is brought in" (Tr. 26); that she did not pay much attention to Cooper's conversation with Appellant (id.).

At this point in this sequence of inconsistent and confused statements, defense counsel attempted to establish clearly whether the witness actually heard Cooper inform Appellant of his rights or assumed he did so based on her knowledge of his "normal" practice, but the judge terminated the questioning. (Tr. 26).

The testimony, thus cut off prematurely, is unclear as to when Cooper gave his advice to Appellant, if he did so at all. However, the only reasonable conclusion that can be drawn from the witness' entire testimony is that she initially questioned Appellant to obtain the information for the police papers, that during this phase of the questioning he was asked why he took the coats and gave his ambiguous answer, and that he was thereafter turned over to Mr. Cooper for more questioning or conversation, during which -- if at

any time -- Cooper informed Appellant of his rights.

This procedure was not adequate. Appellant should have been informed of his rights and of the consequences of making statements before incriminatory information was solicited from him. Statements obtained by interrogation of an accused in custody without such advice must not be used against him, and Appellant's "admission" should have been excluded.

CONCLUSION

For the reasons stated in Parts I and II of this Brief, it was error for the trial court to deny the Appellant's motion for a directed verdict of acquittal. The Court should reverse the judgment of the trial court and remand the case to the trial court with instructions to enter a judgment of acquittal.

Even if there were sufficient evidence to send the case to the jury, it was error, for the reasons stated in Part III, for the trial court to admit into evidence the Appellant's allegedly self-incriminating statement. Thus, even if the Court were to affirm as to Parts I and II, it should reverse the judgment

of the trial court pursuant to Part III and remand the case to the trial court for appropriate further proceedings.

Respectfully submitted,

/s/ Paul Daniel

Paul Daniel

/s/ Frederick S. Hird, Jr.

Frederick S. Hird, Jr.

Klagsbrunn & Hanes
710 Ring Building
Washington, D. C. 20036

Attorneys for Appellant
(Both appointed by this Court)

November 28, 1966

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,186

WALLACE RICE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL IN FORMA PAUPERIS FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Paul Daniel
Frederick S. Hird, Jr.

Klagsbrunn & Hanes
710 Ring Building
Washington, D. C. 20036

Attorneys for Appellant
(Both appointed by this Court)

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 20,186

WALLACE RICE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the District of Columbia

REPLY BRIEF FOR APPELLANT

I. The Government's Brief Does Not Deal With the Substance of Appellant's Point That the Prosecution Failed to Prove the Identity and Corporate Existence of the Alleged Owner of the Stolen Goods.

The Government concedes the need to prove corporate identity but fails to discuss the points raised in Appellant's brief concerning the inadequacy of the evidence at the trial in the light of the prior decisions of this Court, viz., the lack of qualifications of the single witness who touched upon the point and the inconsistency of the testimony given by the prosecution witnesses as to corporate identity and ownership of the goods.

The Government's brief states that the testimony of three "May Company" employees proved the corporate character of The May Department Stores Company, alleged owner of the goods (Brief for Appellee, p. 7). This is clearly wrong. Only one witness, Vivian Emory, gave any testimony bearing on the corporate character of the alleged owner. As the Government brief itself shows (at p. 7), the other two witnesses testified only as to the name of their employer and the name of the owner of the goods, mentioning variously "The May Company" and "the Hecht Company" (Tr. 54, 66-67). Neither of them, at any point in their testimony, even mentioned The May Department Stores Company, alleged in the indictment to be the owner.

Miss Emory's testimony is worthless. At the outset, when asked where she worked, she gave the obviously coached answer, "The May Department Stores Company, trading as the Hecht Company," (Tr. 9). Then, in "yes" responses to three leading questions by the prosecutor, she testified that The May Department Stores Company is a corporation and that it does business in Washington under the name of the Hecht Company (Tr. 9-10). The May Department Stores Company was never referred to again in her testimony or the testimony of any other witness.

Contrary to the contention of the Government, Miss Emory did not testify that there is a corporate seal of The May Department Stores Company. Instead, her testimony was:

"Q And you don't know what the corporate relationships are that exist between the Hecht Company and The May Company, do you?

"A I know it's a corporation. I know there is a seal." (Tr. 35).

Obviously, she did not know, or say, which of the two companies mentioned - neither of which was The May Department Stores Company - was a corporation or which one had a seal. Her testimony cannot be taken the way the Government would have it.

Furthermore, Miss Emory testified explicitly during her cross-examination that she had no knowledge of the corporate affairs or arrangements of her employer (Tr. 35). There has never been a decision

of this Court even suggesting that the unsupported oral testimony of an admittedly unqualified and unknowledgeable witness would be considered adequate "reputation" proof of corporate existence, identity and ownership of goods. The test established by this Court for proof of corporate character by reputation is "parol evidence of an officer or other person acquainted with the fact." Bimbo v. United States, 65 App. D.C. 246, 249, 84 F.2d 852, 855, cert. denied, 297 U.S. 721 (1936) (emphasis added). The Government has not even contended that Miss Emory was "acquainted with the fact", and her testimony shows that she was not.

II. The Government Has Misconstrued the Evidence Pertaining to Value.

The Government's argument on appeal misses the point that there is no evidence of value here, but only evidence of price tags. Its brief says that Mrs. Smith, the saleslady, stated the "retail values" of the stolen coats (Brief for Appellee, p. 8). In fact she was testifying to the "retail price" (Tr. 69, 73, 74, 75).

Furthermore, the Government is mistaken when it says that Mrs. Smith testified that there was a 40 percent mark-up on these particular coats from which the actual cost to the owner could be calculated (Brief for Appellee, p. 8). Mrs. Smith said no such thing. She testified only as to her understanding of the Hecht

Company's usual mark-up practice. She specifically testified that she did not know whether she had done the mark-up on these coats (Tr. 72), that she did not know who the supplier was (Tr. 77), that she did not know who the manufacturer was (Tr. 78), that she did not know where the invoices for these coats were (Tr. 78), and ultimately that she had no actual knowledge of what the store actually paid for these coats (Tr. 85). Thus, contrary to the Government, there was no evidence whatsoever as to the wholesale cost of the coats.

Finally, the Government implies that Mrs. Smith gave expert testimony as to the value of the coats (Brief for Appellee, p. 8). At no point did she purport to give her own opinion of the value. Her testimony was limited to the retail price as shown by the price tags, and to answering questions showing that she knew nothing else about these coats. Since she gave no opinion about value, her alleged expertise is irrelevant.

Appellee's brief implies that Lauder v. State, 233 Md. 142, 195 A. 2d 610 (1963) supports the proposition that price-tag evidence alone is sufficient to establish retail value. The implication is unwarranted. The only issue presented in that case with respect to price tags was as to their admissibility under the business records rule. As to value, there was opinion testimony of the

store detective - precisely what is lacking in this case - and the appellant was challenging the qualifications of the witness to have given such testimony. The Maryland court held, quite simply, that since appellant had raised no objection to the opinion testimony at the trial and had not cross-examined the witness, he would not be heard to raise the issue on appeal. Since there is no issue in this case as to admissibility of price tags into evidence, and since there was no opinion testimony of value even offered, the Lauder case is totally irrelevant.

III. The Government Fails to Meet the Issue as to Admissibility of Appellant's Statement, "You've Got Me."

A. The Government's brief is silent as to the non-incriminatory character of Appellant's statement.

While the Government has failed even to mention this important aspect of the case, its oblique reference to another defendant's admission, "I need the money," in another case[1/] in fact tends to emphasize the contrast between Appellant's ambiguous and non-commital "You've got me" and a genuine admission. In that other case, the defendant's statement was made at the time of apprehension and arrest, was clearly responsive to the question asked, and was unambiguously incriminating. Compare these facts with the inaccurate and prejudicial opening comments of the prosecutor in this case (Tr. 6)

1/ Pyles v. United States, D.C. Cir., No. 19,709, decided June 2, 1966.

which clearly imply that the Appellant's statement was made at the time he was placed under arrest and which misdescribes his words as, "Well, I guess you caught me." This fictional version of the facts is very close to the facts of the Pyles case, but like the facts in Pyles, bears little resemblance to the actual facts established by the testimony of the prosecution witnesses in this case.

The actual facts, as emphasized by the contrast with Pyles, establish that there was no incriminatory connotation in Appellant's statement. The Government has failed even to argue otherwise, much less to question Appellant's assertion that the repeated characterization of the statement as an admission by prosecutor and judge was prejudicial.

B. The Government misconstrues the evidence as to the advice to Appellant by the detectives of his rights.

The Government defends the receipt of Appellant's allegedly incriminating statement, obtained in interrogation by store detectives while Appellant was being forcibly detained awaiting the arrival of the police, on the ground that Appellant had been advised of his right to counsel and his right to remain silent before he was questioned (Brief for Appellee, p. 11). The record does not show this. One store detective testified on direct examination that another store detective (who did not appear as a witness) so

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advised Appellant, but she did not say when. As pointed out in detail in Appellant's Brief (pp. 23-24), her testimony on cross-examination was contradictory and thoroughly confused the issue, but the judge prevented Appellant's trial counsel from pursuing the matter further. Thus the time that Appellant was advised of his rights, if he ever was advised of his rights, is not established in the record, and the Government's reliance on a warning is misplaced.

CONCLUSION

For the reasons stated in the Brief for Appellant, and in this Reply Brief, the judgment of the District Court should be reversed.

Respectfully submitted,

/s/ Paul Daniel

Paul Daniel

/s/ Frederick S. Hird, Jr.

Frederick S. Hird, Jr.

Klagsbrunn & Hanes
710 Ring Building
Washington, D. C. 20036

Attorneys for Appellant
(Both appointed by this Court)

January 9, 1967

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,186

WALLACE RICE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

LAWRENCE S. MARGOLIS,
Special Assistant United States Attorney.

Cr. No. 55-66

QUESTIONS PRESENTED

In the opinion of the Appellee, the following questions are presented.

1) Whether the corporate character of the owner of the alleged stolen coats was proven by the testimony of three May Company employees including an assistant in charge of security, a special officer and a saleswoman.

2) Whether in this prosecution for grand larceny the value of the alleged stolen coats was proven to be in excess of $100 by the expert testimony of a saleslady employed by the May Company for 30 years.

3) Whether an admission of the Appellant while in custody of May Company employees to the effect "You've got me", made 15-20 minutes after being informed of his rights was voluntary.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,186

WALLACE RICE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted on January 10, 1966, charged with having stolen the property of The May Department Stores Company of the value of about $348 consisting of five coats on October 9, 1965. He was tried before a jury and convicted of grand larceny (§ 22-2201, D.C. Code, 1961 Edition) on March 16, 1966. He was sentenced to imprisonment for a term of 40 months to 10 years on April 22, 1966. Appellant appealed to this Court on May 2, 1966.

At the trial the first witness for the Government was Vivian Emory, an assistant in charge of security at the

Hecht Company (Tr. 10). She stated that she worked for "The May Department Stores Company, trading as the Hecht Company" (Tr. 9). She further answered questions to the effect that The May Department Stores Company is a corporation, that it does business in Washington under the name of the Hecht Company (Tr. 9, 10), and that there is a corporate seal (Tr. 35). She also testified that she worked at the Hecht Company for 12 years (Tr. 10). On October 9, 1965 while working at the 7th and F Street, N.W., store, she was called to the third floor at about 2:30 P.M. by Mrs. Kling, another employee. While on the third floor she "saw a colored man up there pushing a hamper (canvas container with wheels) with cartons in it." (Tr. 11). She identified the man as the defendant (Tr. 11). He had on clothing "very similar to the clothing our porters wear" (Tr. 12). The hamper had " 'Hecht Company' printed along side of it" (Tr. 13). While in the coat department, Appellant took an empty cardboard carton from the hamper, put it on the floor, took a coat off a hanger, and stood with it in his hands (Tr. 13, 39). A customer walked up beside him, and he hung the coat back up on the rack and went back to the hamper with the carton. (Tr. 13, 39). He stood there for a few minutes, took the carton again, and went to the back part of the coat department where there were suede and leather coats on the rack (Tr. 14). Appellant reached up, took three red coats from the rack, folded them and put them in the carton on the floor (Tr. 14, 39-41). He reached out and got a couple more coats, rolled those up and put them in the carton (Tr. 14). He picked up the carton, put it on his shoulder and left the coat area, leaving the hamper there (Tr. 14). He went through one dress department and was going through another dress department when a Mr. Sandberg, head of the security department, who had been summoned, arrested the Appellant (Tr. 17, 50). Before being arrested, Appellant had walked about 500 feet, where he was stopped near the Embassy Room which was near an elevator (Tr. 50, 51). Appellant either threw or dropped

the carton on the floor (Tr. 17, 51), and the coats spilled out of the carton. Vivian Emory identified four of the coats by the price tags with her initials and date on them (Tr. 16-18). The fifth coat had no price tag (which was apparently lost) and was not admitted into evidence. Appellant was taken to the Security Office on the second floor.

A hearing away from the jury was held to determine if the statement made by Appellant at the Security Office was voluntary (Tr. 21). The witness Vivian Emory testified at the hearing that Appellant was kept in the room for 30-45 minutes while police papers were filled out (Tr. 22, 29). The police were summoned about 15-20 minutes after Appellant was taken to the Security Office (Tr. 28). The police arrived about 20 minutes after they were called (Tr. 28). During the 15-20 minute interval, Appellant was asked his name, address, date of birth, etc., so that the police papers could be completed (Tr. 22). Immediately after obtaining the necessary information, Appellant was asked by Vivian Emory "why he took them [the coats]" (Tr. 22, 23, 30). Appellant said, "You've got me" (Tr. 23, 30). Appellant made no other statement concerning the circumstances of the alleged offense (Tr. 23). No physical force was used in the interrogation, nor was Appellant handcuffed, nor was he threatened, nor did he ask to see a lawyer, nor did he refuse to answer any questions (Tr. 23, 24). On cross-examination Vivian Emory stated that Mr. Sandberg, Mr. Cooper (second in charge of all security for the Hecht Company) and Mrs. Kling (a special officer) were in the Security Office during the questioning. Mr. Cooper (who was already at the Security Office when Appellant was brought there) informed Appellant of his rights when Appellant arrived (Tr. 25). Cooper advised Appellant "that he didn't have to make a statement, that he was entitled to counsel" (Tr. 25, 26). The Appellant did not testify at the hearing.

Judge Howard F. Corcoran held that the "statement was not made during a period of illegal detention", that

the "man was warned of his right to counsel and right to keep silent" and "was not unnecessarily delayed at the Hecht Company store", and that "it is just a matter of procedure when they arrest someone to fill out certain papers" (Tr. 33). Judge Corcoran held that the statement "You've got me" was admissible considering all the circumstances (Tr. 33). When the jury was recalled, Vivian Emory repeated essentially the same testimony she had given at the hearing.

Mrs. Belva Kling testified that she was employed as a special officer "at the May Company, trading as the Hecht Company, Seventh and F Streets" for approximately one year and was working there to protect the store (Tr. 54). Mrs. Kling testified she saw the Appellant (whom she identified) come out of the Bridal Shop pushing a hamper. He was dressed similarly to Hecht Company porters (Tr. 55). The hamper had "Hecht Company" marked on the side (Tr. 56). Appellant walked into a stockroom followed by a saleswoman. He left the stockroom, went back to the hamper, took off a carton, tried to stuff some coats into the box but couldn't because people were coming off the elevator (Tr. 57). He then went around the corner to the suede coats and took five coats off the rack, rolled them up, put them in the empty carton, placed the box on his shoulder, walked through the dress department and was arrested near the Embassy Room (Tr. 57, 58). Mrs. Kling called Miss Emory for assistance (Tr. 58). Mrs. Kling corroborated the arrest by Mr. Sandberg, the dropping of the carton by Appellant and the statement "You've got me" made by the Appellant in her presence (Tr. 59, 60). She also identified the four coats allegedly stolen by Appellant as having her initials on them (Tr. 60, 61).

The last witness for the Government was Mrs. Martha Smith, a saleslady in the coat department, who had worked for the Hecht Company for nearly 30 years (Tr. 66). She identified the 4 coats later admitted into evidence as the property of "The May Company or the Hecht Company" (Tr. 67). She identified them by the buttons,

lining and style of the coat and had sold coats like those (Tr. 68). She testified that coats of that type were on sale on October 9, 1965, the day of the alleged larceny. Mrs. Smith stated that the retail values of the coats were $80, $110, $80, and $130 (Tr. 69, 73-75). Thus the total retail value of the 4 coats was $400. She further testified that there was a 40% markup on the coats (Tr. 69, 70, 72). In other words, the actual cost to The Hecht Company was 60% of the retail price, or $240. Mrs. Smith testified that she knew the markup since she made the markups on the coats at the warehouse as they came in from the wholesaler (Tr. 71). She further stated she had been doing markups on coats for *7 years* (Tr. 72). She finally testified that when the coats are delivered, there is a sheet pinned on it with the manufacturer's price on one side and the markup on the other side (Tr. 77, 78).

The Appellant presented no witnesses, nor did he testify at the hearing or the trial.

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 2201, provides:

> Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years.

SUMMARY OF ARGUMENT

I

The Government proved the corporate character of the owner of the alleged stolen goods by the testimony of three May Company employees including an assistant in charge of security, a special officer and a saleswoman.

II

The value of the alleged stolen coats in this grand larceny prosecution was proven to be in excess of $100 by the expert testimony of a saleslady employed by the May Company for nearly 30 years.

III

The admission of the Appellant while in the custody of May Company employees to the effect "You've got me", made 15-20 minutes after being informed of his rights was voluntary and admissible.

ARGUMENT

I. The Government proved the corporate character of the owner of the alleged stolen goods by the testimony of three May Company employees including an assistant in charge of security, a special officer and a saleswoman.

(See Tr. 9, 10, 35, 54, 66, 67, 92, 93.)

It is fundamental that in a prosecution for larceny one of the essential elements to be proved is the ownership of the stolen property. In a criminal prosecution, it is generally held that formal proof is not required and that corporate existence may be proved orally and by general reputation. *Richardson* v. *State*, 221 Md. 85, 156 A.2d 436 (1959). The corporate character of the owner of stolen property may be proved by reputation, i.e., by evidence tending to show that the corporation was *de facto* organized and acting as such. *Bord* v. *United States*, 133 F.2d 313, *cert. denied*, 317 U.S. 671 (1942); *Fields* v. *United States*, 27 App. D.C. 433 (1906), *cert. denied* and writ of error dismissed, 205 U.S. 292 (1907). Corporate character may be proved by a corporate officer *or other person* acquainted with the fact. *Bimbo* v. *United States*, 65 App. D.C. 246, 82 F.2d 852, *cert. denied*, 297 U.S. 721 (1936).

In the instant case, Vivian Emory, an assistant in charge of security employed by the Hecht Company for 12 years, testified that she worked for "The May Department Stores Company trading as the Hecht Company" (Tr. 9). She also answered questions to the effect that The May Department Stores Company is a corporation, that it does business in Washington under the name of the Hecht Company (Tr. 9, 10) and that there is a corporate seal (Tr. 35). Mrs. Belva Kling, a special officer employed by the Hecht Company for approximately one year, testified that she was employed "at the May Company trading as the Hecht Company, Seventh and F Streets" (Tr. 54). The last Government witness, Mrs. Martha Smith, who had been employed by the corporation for nearly 30 years, identified the allegedly stolen coats as the property of "The May Company or the Hecht Company" (Tr. 66, 67). The Government proved the corporate existence of the owner of the alleged stolen coats orally and by general reputation by the testimony of the three employees who had worked for the Hecht Company for 12, 1 and 30 years, respectively. These employees knew that the May Department Stores Company traded as the Hecht Company, that it was in fact a corporation, and acted as such.

Judge Corcoran considered the issue as to whether the corporate character of the owner of the alleged stolen coats was established and held that it could be and was established by reputation (Tr. 92, 93).

II. The value of the alleged stolen coats in this grand larceny prosecution was proven to be in excess of $100 by the expert testimony of a saleslady employed by the May Company for nearly 30 years.

(See Tr. 66-75, 89)

The test for the value of stolen property is market value, and particularly retail value. *Lauder* v. *State*, 233 Md. 142, 195 A.2d 610 (1963). In order to testify as to whether the value of the stolen goods exceeded $100

to prove grand larceny, the witness must be properly qualified. *Owens* v. *United States*, 115 U.S. App. D.C. 233, 318 F.2d 204 (1963).

Mrs. Martha Smith, a saleslady for the Hecht Company for nearly *30 years*, identified the four coats admitted into evidence as the property of the May Company or Hecht Company (Tr. 66, 67). She identified the coats by the buttons, lining and style and had sold coats like those (Tr. 68). Mrs. Smith stated the retail values of the coats were $80, $110, $80 and $130 (Tr. 69, 73-75). The total retail value was $400, far in excess of $100 required to prove grand larceny. She further testified that there was a 40% markup on the coats (Tr. 69, 70, 72). Thus the actual cost to the Hecht Company was 60% of the retail value of $400, or $240, still much in excess of the required $100. Mrs. Smith said she knew the markup since she made markups on the coats at the warehouse as they came in from the wholesaler (Tr. 71). Mrs. Smith stated she had been doing markups on coats for *7 years* (Tr. 72). Mrs. Smith clearly was qualified as an expert to testify as to the value of the alleged stolen coats. In *Owens* v. *United States*, *supra*, the defendant was found guilty of stealing a television set valued at over $100 from a Philco showroom. In that case, the manager of the showroom qualified as an expert as to the value of the television set.

In *Lauder* v. *State*, *supra*, the Chief Security Officer for the May Department Stores, Inc., testified that the defendant took a tape recorder from a display counter and concealed it.

The Security Officer identified a price tag attached to the stolen recorder and testified as to the $199.95 price on it. The Court in that case affirmed the larceny conviction.

The Court in the instant case was satisfied that the value of the coats was in excess of $100 (Tr. 89). Apparently, the jury was also satisfied.

III. The admission of the Appellant while in the custody of May Company employees to the effect "You've got me," made 15-20 minutes after being informed of his rights was voluntary and admissible.

(See Tr. 10, 20-26, 28-30, 33, 54, 60.)

Appellant contends that his statement made in the custody of Hecht Company employees was inadmissible. The Fifth Amendment prohibition against a person in a criminal case being compelled to be a witness against himself and the Sixth Amendment's provision for the right to assistance of counsel apply *only* to governmental action and not to the undertakings of private citizens. *Cf. Burdeau* v. *McDowell*, 256 U.S. 465 (1921) at 475. In the instant case, Vivian Emory was employed as an assistant in charge of security for the Hecht Company (Tr. 10). Mrs. Belva Kling worked as a special officer for the Hecht Company to protect the store (Tr. 54). Mr. Sandberg was employed as the head of the security department (Tr. 20). Mr. Cooper worked with the security department out of central personnel (Tr. 20). There is nothing in the record to indicate that these employees were connected with the Government. All the witnesses were private citizens employed by the Hecht Company. Therefore, the Fifth and Sixth Amendments do not apply. Any objection to the admissibility of the alleged voluntary statement goes to its weight rather than its admissibility.

Assuming *arguendo* that such employees are agents of the Government, the admission is still admissible.

The Appellant was tried and convicted before a jury on March 16, 1966.[1]

A confession to be admissible in evidence must be voluntary. *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) at 490, 491 held that statements elicited by the police during an interrogation may not be used against the accused at a

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[1] *Miranda* v. *Arizona*, 34 U.S.L. Week 4521, (June 13, 1966) applies only to those cases in which the trial began after the date of the decision in that case. *Johnson* v. *New Jersey*, 34 U.S.L. Week 4592 (June 20, 1966). Therefore, *Miranda* has no applicability to the present case.

criminal trial, "[where] the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent. . . ."

Vivian Emory, an assistant in charge of security for the Hecht Company, testified that after commission of the alleged offense Appellant was taken by the Hecht Company employees to the Security Office on the second floor at the store.

The jury was excused to determine if the statement made by Appellant was voluntary (Tr. 21). She then testified at the hearing that Appellant was kept in the room for 30-45 minutes while police papers were filled out (Tr. 22, 29). Mr. Cooper (who was already at the Security Office when Appellant arrived) informed Appellant of his rights when he arrived. (Tr. 25). Cooper advised Appellant "that he didn't have to make a statement, that he was entitled to counsel" (Tr. 25, 26). The police were summoned about 15-20 minutes after Appellant was taken to the Security Office (Tr. 28). The police arrived about 20 minutes after they were called. (Tr. 29). During the 15-20 minute interval, Appellant was asked his name, address, date of birth, etc., so that the police papers could be completed (Tr. 22). Immediately after obtaining the necessary information, Appellant was asked by *Vivian Emory* "why he took them [the coats]" (Tr. 22, 23, 30). Appellant said, "You've got me" (Tr. 23). Appellant made no other statement concerning the circumstances of the alleged offense. (Tr. 23). No physical force was used in the interrogation, nor was Appellant handcuffed, nor was he threatened, nor did he ask to see a lawyer, nor did he refuse to answer any questions (Tr. 23, 24).

Appellant did *not* testify at the hearing. Judge Howard F. Corcoran held that the "statement was not made during a period of illegal detention," that the "man was warned of his right to counsel and right to keep silent" and "was not unnecessarily delayed at the Hecht Company store," and that "it is just a matter of procedure when they arrest someone to fill out certain papers" (Tr. 33). Judge Corcoran held that the statement "You've got me" was admissible considering all the circumstances (Tr. 33). When the jury was recalled, Vivian Emory repeated essentially the same testimony she had given at the hearing. Mrs. Belva Kling corroborated the fact that the Appellant made the statement "You've got me" (Tr. 60). The jury, under proper instructions, apparently found the statement was voluntary (Tr. 117).

Escobedo v. *Illinois*, *supra*, does not apply in the instant case because Appellant was warned of his right to remain silent and his right to counsel; and further, because Appellant had not requested nor had he been denied an opportunity to consult with his lawyer.

There was not a scintilla of evidence of threats or coercion by the Hecht Company employees during the 30-45 minute interval before the Metropolitan Police arrived. The admission was clearly voluntary.

In *Pyles* v. *United States*, No. 19,709 decided June 2, 1966, —— U.S. App. D.C. ——, —— F.2d ——, it was held that a statement made by the defendant near the scene of a robbery while the police officer held a gun on the defendant was admissible. There the police officer asked the defendant "what did he hold that place up for"; and defendant said: "I need the money." *A fortiorari* the admission "You've got me" in the instant case made immediately after routine identification questions were asked Appellant is admissible. Furthermore, to substantiate a defendant's contention that his confession was involuntary, it is generally necessary for him to take the stand at the hearing. *Pyles* v. *United States*, *supra*, slip opinion at p. 6. In the instant case, Appellant did not testify at the hearing.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

LAWRENCE S. MARGOLIS,
Special Assistant
United States Attorney.

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